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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1964

No. 649

IN RE METRO HOLOVACHKA,

Petitioner

Petition for a Writ of Certiorari to the Supreme Court of Indiana

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INDEX

	PAGE
Citations to the Opinion below	1
Jurisdiction	2
Questions presented	3
Rules and Statute invloved	3
Statement	4
Reasons for Granting the Writ	10
Conclusion	14
Appendix A—Rules and Statute	1a
B—Opinion and judgment below	3a
C—Attorney Gavit's Plea for Continuance	36a

LIST OF AUTHORITIES CITED

Citations:

Baker v. Miller, 236 Ind. 20	4, 8
Beilan v. Board of Education, 357 U.S. 399	12
Cohen v. Hurley, 366 U.S. 117	10, 12, 13
Deutch v U. S., 367 U.S. 456	13
Gideon v. Wainright, 372 U.S. 335	11
Greene v. Mc Elroy, 360 U.S. 474	10
Hannah v. Larche, 363 U.S. 420	10
In Re Anastoplo, 366 U.S. 82	12, 13
In Re Holovachka, 198 N.E. 2d 381	1
In Re Oliver, 333 U.S. 257	12
Konigsberg v. State Bar of California, 353 U.S. 252	10
Lerner v. Casey, 357 U.S. 468	12
Malloy v. Hogan, 378 U.S. 1	13

Morgan v. U. S., 304 U.S. 1 10
Powell v. Alabama, 287 U.S. 45 11
Reynolds v. Cochran, 365 U.S. 525 11
Russell v. U. S., 369 U.S. 749 12
Schware v. Board of Bar Examiners, 353 U.S. 232 10
Sinclair v. U. S., 279 U.S. 263 12
U. S. v. Holovachka, 7th Cir. 314 F. 2d 345, cert. den 374 U.S. 809, reh. den. 374 U.S. 859 4
Watkins v. U. S., 354 U.S. 178 13
Willner v. Committee on Character, 373 U.S. 96 10

Statute And Rules:

Rules of the Supreme Court of Indiana—
Rule 3-20 ..... 3, 1a
Rule 3-21 ..... 3, 5, 2a
Rule 3-24 ..... 3, 2a
Rule 3-25 ..... 3, 3a
52 Stat. 942, 2 U.S.C. Sect. 192 ..... 3, 3a

Miscellaneous:

Hearings before the Selection Committee on Improper Activities in The Labor or Management Field, 86th Cong. 1st Sess., Part 53—
p. 18441 8
p. 18604 9
p. 18605 9
p. 18606 ..... 9, 13
p. 18607 7
p. 18608 7
p. 18616 7
p. 18624 7
p. 18625 7
p. 18626 9
p. 18627 7

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IN RE METRO HOLOVACHKA,

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Petition for a Writ of Certiorari to the Supreme Court of Indiana

Petitioner prays that a writ of certiorari issue to review the order of the Supreme Court of Indiana entered in the above entitled case of May 11, 1964.

CITATIONS TO THE OPINION BELOW.

The opinion of the Supreme Court of Indiana is not officially reported. It is unofficially reported at 198 N.E. 2d 381 and is printed in Appendix B hereto, p. 3a.[1]

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[1] The transcript of the hearing held before Commissioner Lamb is paged and shall be referred to as Tr. The exhibits introduced at said hearing are numbered. The various pleadings, briefs, documents and papers filed below are not paged, but are identified by number in a Transcript of Docket Entries filed herein with the record. These shall be referred to herein by that number. Thus, the aforementioned opinion and order is Dkt. 65.

JURISDICTION.

The order of the Supreme Court of Indiana was entered on May 11, 1964 (Dkt. 65, Appendix B, pp. 34a-35a). Rehearing was denied on July 7, 1964 (Dkt. 69). By order dated October 5th, 1964, the time for filing this petition was extended to and including November 5th, 1964. The jurisdiction of this Court is invoked under *28 U.S.C. Sect. 1257 (3)*. Petitioner's inability to be present at the hearing and his counsel's[2] inability to prepare for the hearing together with the reasons therefore was made known to Commissioner Lamb on the opening day of the hearing (Tr. 4-8, Dkt. 39[3]).

Petitioner's contention that a hearing held without petitioner's presence and without prepared counsel violated his right to due process of law under the 14th Amendment was raised in his "Exceptions of Defendant Metro Holovachka etc." (Dkt. 53) and his brief in support thereof (Dkt. 62). Petitioner's contention that grounds for disbarment could not be found from his objections to the scope and pertinency of some of the questions asked him at a congressional hearing was raised in said brief. These questions were again raised in petitioner's petition for rehearing (Dkt. 66). The court below overruled these contentions in its opinion, Appendix B, pp. 27a-32a.

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[2] Attorney Albert H. Gavit of Gary, Indiana.

[3] Incorrectly styled "Holovachka's affidavit for continuance." In fact, it is Attorney Albert H. Gavit's affidavit for continuance.

QUESTIONS PRESENTED.

1) Whether the Due Process Clause of the 14th Amendment guarantees an attorney the right to effective counsel at a hearing held on an information for disbarment?

2) Whether it is a denial of due process of law guaranteed by the 14th Amendment for a Commissioner to go forward with a hearing on disbarment in spite of defendant's counsel's representations as an attorney and under oath that defendant's health and nervous condition made it impossible for counsel to prepare for the hearing or defendant to participate therein?

3) Whether it is a denial of due process of law guaranteed by the 14th Amendment for a State Court to find grounds for disbarment from an attorney's alleged failure to cooperate with a Congressional Committee by refusal to answer some of the questions asked him on the grounds that the questions were beyond the scope of the resolution creating the Committee and were not pertinent to the scope of that resolution?

RULES AND STATUTE INVOLVED.

The relevant rules of the Supreme Court of Indiana are *Rules 3-20, 3-21, 3-24* and *3-25* as amended to September 10, 1962. They are set out in Appendix A, pp. 1a *et. seq.* The relevant statute is *52 Stat. 942, 2 U.S.C. Sect. 192,* the contempt of Congress statute. It is set out in Appendix A, p. 3a.

STATEMENT.

Petitioner was the former prosecuting attorney for Lake County, Indiana. On February 22, 1962, petitioner was found guilty on a three count indictment charging him with wilfully attempting to evade and defeat his income taxes for the years 1955, 1956 and 1957, in violation of Sec. 7201 of the Internal Revenue Code of 1954.[4] Such conviction alone is not sufficient grounds for disbarment in Indiana, *Baker* v. *Miller*, 236 Ind. 20.

While an appeal from said conviction was pending, a verified petition for leave to file an information for disbarment and a supplement thereto were filed in the Supreme Court of Indiana by the Northwest Indiana Crime Commission, Inc., on May 15, and May 28, 1962 respectively. The said information and supplement alleged that petitioner violated his oath as attorney and his oath of office. (Dkt. 1 and 2). Purported summaries and portions of testimony given in 1959 before the Select Committee on Improper Activities in The Labor or Management Field, 86th Congress, 1st Sess. together with portions of said Committee's final report were appended to the supplement.[5] The Supreme Court of Indiana, by order dated June 25, 1962 (Dkt. 4), granted leave to file said information, designated the Attorney General to repre-

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[4] This conviction was affirmed on February 18, 1963, *U. S.* v. *Holovachka*, 7th Cir. 314 F. 2d 345, reh. den. March 28, 1963; cert. den. 374 U.S. 809, reh. den. 374 U.S. 859. Petitioner is presently serving the three year sentence imposed by the Court.

[5] Needless to say, petitioner has never confronted or cross examined witnesses appearing at these hearings.

sent the State of Indiana, and appointed Judge Newell A. Lamb as Commissioner to investigate, hear and take evidence on the charges.[6] On October 24, 1962, a verified application for change of venue from Commissioner Lamb alleging bias and prejudice and stating specific reasons therefore was filed by petitioner (Dkt. 19). This application was opposed by the said Attorney General (Dkt. 20) and denied by the Court on October 30 1962 (Dkt. 22). By order dated February 5th and filed February 7, 1963 the Commissioner set the hearing for March 12, 1963 (Dkt. 36).[7]

At the March 12, 1963 hearing, petitioner's counsel appeared and requested a continuance on the grounds that petitioner's health and nervous condition *prevented counsel from preparing the case* or petitioner from making a meaningful participation therein (Tr. 4-8). Counsel filed his affidavit to that effect (Dkt. 39). His appeal to the Commissioner is set out in relevant portion in Appendix C, p. 36a.[8] This request was opposed by the Indiana Attorney General by verified motion and by argument (Dkt. 39, Tr. 9-12); although he conceded Attorney Gavit's

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[6] This June 25th order mentions a Disciplinary Commission recommendation, but petitioner is unable to find such recommendation in the record or a docket entry to identify it, see Rule 3-21, Appendix, A, p. 2a.

[7] Two previously scheduled hearing dates were reset by the Commissioner because of the illness of both counsel (Dkt. 28, 32). The Attorney General conceded that these two continuances were not the fault of anyone (Tr. 9).

[8] On this date, March 12, 1963, petitioner's petition for rehearing of the tax conviction was pending in the Court of Appeals for the 7th Circuit. Mr. Gavit explained to the Commissioner that petitioner's health and nervous condition was caused by this tax litigation and that the conviction was not final on that date.

sincerity, integrity and honesty (Tr. 9) and later referred to him as "an honored and respected member of the Bar of this State" (Brief of the State of Indiana, Dkt. 59, p. 68). The Commissioner overruled the motion for continuance and sustained the motion in opposition (Dkt. 40) on the grounds there was no medical evidence to justify a continuance and the hearing could go forward without the presence of petitioner since this was a civil action (Tr. 16-17). Mr. Gavit was excused and the hearing went forward without petitioner or his counsel in spite of counsel's statements under oath that he had been unable to prepare the case because of petitioner's then health condition.

On June 24, 1963, petitioner commenced serving the sentence imposed pursuant to the income tax conviction. On June 27, 1963, the Commissioner filed his Findings of Fact and Recommendation (Dkt. 48). He recommended disbarment. Despite his earlier belief that this was a civil matter which could be heard without the presence of petitioner, he specifically found, *inter alia*, petitioner guilty of specific acts of perjury, an indictable offense in Indiana (Dkt. 48, pp. 7-9).

On July 29, 1963, petitioner filed exceptions to the Findings of Fact and Recommendation of Commissioner Lamb (Dkt. 53). This included an affidavit by petitioner and additional matters as a defense to matters brought out at the hearing. The inclusion of this defensive material was opposed by the State (Motion to Strike in Two Paragraphs, Dkt. 54),[2] and stricken by order of the Court dated November 7, 1963 (Dkt. 58).

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[2] The State also opposed the appearance of new counsel for petitioner. This was overruled by the November 7, 1963, order.

A brief and petition for rehearing were filed on behalf of petitioner (Dkt. 62, 66). In the brief, petitioner's counsel requested oral argument (Dkt. 62, p. 27). This request was neither granted or denied, but was ignored. A brief in chief and a brief opposing rehearing were filed by the State (Dkt. 59, 67).

No evidence or witness on behalf of petitioner has ever been heard by the Commissioner or the Supreme Court of Indiana. Nor has petitioner confronted the witnesses used against him at the ex parte hearing.

The court's opinion and order of disbarment was issued on May 11, 1964 (Appendix B, pp. 4a *et seq.*). The court based its order on the following:

1) That from the evidence adduced at the hearing and unexplained by him, petitioner received a vast amount of money by way of pay-offs, protection, kick-backs, and bribes in order that vice and gambling could operate without interference in Lake County.[10] This showed the

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[10] There is not a scintilla of evidence in this record that petitioner ever received pay-offs, protections, kick-backs or bribes. In fact, when asked about this before the McClellan Committee petitioner specifically denied it (Hearings before the Select Committee on Improper Activities in the Labor or Management Field, 86th Congress, 1st Sess., Part 53, pp. 18608, 18616, 18624, 18625, 18627, hereinafter "McClellan Hearings"). The Court also emphasizes in this portion of its opinion that petitioner refused to cooperate with this committee in giving any information as to gambling, prostitution and vice conditions in Lake County. Needless to say, such questions were never asked petitioner by a committee whose function was to investigate improper practices in labor or management relations (18607). The relevant portions of the transcript of these hearings was introduced by the State as exhibit 27 in the ex parte hearing before the Commissioner. Petitioner states here as he stated in his petition for rehearing below that the "unexplained" and "unchallenged facts" introduced in the ex parte hearing will be shown to be pure unadulterated falsehoods in a due process hearing.

utter depravity and moral turpitude necessary to distinguish this case from *Baker* v. *Miller*, 236 Ind. 20 wherein the court held that a bare conviction of income tax evasion without an additional showing of moral turpitude was not enough for disbarment. (18a-21a).

2) That from the "unchallenged" evidence adduced at the hearing petitioner failed to prosecute persons guilty of violating the vice and gambling laws of the state and that he used his office in various illegal ways one of which was to destroy the organization of a labor union. (21a-23a)[11]

3) That from the evidence adduced at the hearing, petitioner committed perjury when he executed certain affidavits and testified in certain administrative proceedings and that he criminally violated certain other statutes of Indiana thus committing seven different indictable felonies. (24a-27a).

4) That he was guilty of offensive personality in his dealings with the McClellan Committee and that he failed and refused to cooperate with this committee particularly

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[11] This refers to John Testo who was head of Local No. 1 of the Automatic Equipmer and Coin Machine Operators Service and Repairman. His testimony at p. 18441 of the McClellan Hearings is illuminating:

> Mr. Kennedy: So it was really the gangsters and the racketeers there and threats to your wife plus the help and assistance of the law enforcement people and officials of Mr. Holovachka's office and certain representatives of the police department in Gary, Ind., that drove you out of business?
>
> Mr. Testo: Mr. Kennedy, I can't say Holovachka, and I don't know that.

in its legitimate investigations concerning John Testo's Local No. 1 (27a-29a).[12]

5) Finally, the Court held the Commissioner's denial of Counsel's motion for a continuance was not a denial of petitioner's right to due process of law (29a-32a).[13]

Petitioner's sole refusal to answer before the McClellan Committee was to questions concerning the source of his income. Petitioner's objection was that such questions went beyond the scope of the authority of the committee and were not pertinent to that scope. (McClellan Hearings 18606). Petitioner has never been indicted for contempt of Congress.

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[12] The committee transcript fails to support this alleged refusal to cooperate; see p. 18604 where petitioner offered to testify about Mr. Testo; p. 18626, *et. seq.* concerning petitioner's testimony about this Union when questioned; p. 18605 concerning petitioner's offer to cooperate with the Committee as to all questions concerning labor management relations and purported rackets in Lake County, Indiana.

[13] The Court places considerable weight on petitioner's anarchic conduct in refusing a subpoena to attend his disbarment hearing without giving any credence to Mr. Gavit's plea before the Commissioner that such conduct clearly illustrated the state of petitioner's nerves and health at the time of the hearing. The refusal to respond to this subpoena is apparently a ground for disbarment within the specification concerning the McClellan Committee, in spite of both Mr. Gavits explanation and motion for a continuance and petitioner's constant plea for a hearing since that time.

REASONS FOR GRANTING THE WRIT.

The Supreme Court of Indiana has decided the questions presented in a way not in accord with the applicable decisions of this Court.

I. It is an undeniably correct premise that a State may not *arbitrarily* take away a person's license to practice law; *Cohen* v. *Hurley*, 366 U.S. 117; *Konigsberg* v. *State Bar of California*, 353 U.S. 252; *Schware* v. *Board of Bar Examiners*, 353 U.S. 232. The right to a hearing, to confrontation with and cross examination of defendant's accusers before he can be excluded from the practice of law is no longer open to question; *Willner* v. *Committee on Character*, 373 U.S. 96. Certainly, the words of Justices Goldberg, Brennan and Stewart in their concurring opinion in *Willner* have great applicability to this cause:

> "Certainly lawyers and courts should be particularly sensitive of, and have a special obligation to respect the demands of due process." (p. 106).

What are these demands of due process? In a hearing of a judicial nature affecting legal rights a defendant must be afforded the right to counsel, the right to confront and cross examine witnesses used against him, and the right to be heard in his defense—that is, those fundamental requirements of fairness which are of the essence of due process. In sum, fair play; *Morgan* v. *U. S.*, 304 U.S. 1; *Greene* v. *McElroy*, 360 U.S. 474; *Hannah* v. *Larche*, 363 U.S. 420.

There is little question that neither fundamental fairness or fair play was granted petitioner by the Court below. His counsel's oath and plea that he could not pre-

pare for the hearing because of the condition of petitioner's nerves and health went completely unheeded. Counsel's oath that petitioner could not participate in the hearing was equally unheard. Petitioner's later effort to be heard before the court by documents was stricken. Petitioner's counsel's request for oral argument before the court was ignored. Both the Commissioner and the Court completely misapprehended the nature of the proceedings. For more than a civil action was involved. This was State action going to a citizen's right not to be deprived of his property or reputation without due process of law. And even the "civil action" reason for going forward with the hearing falls in the light of subsequent findings that petitioner committed indictable offenses. The denial of a hearing was clearly arbitrary and erroneous. To hold such a hearing after representations made by able and conscientious counsel that his client's nerves and health condition made effective advocacy impossible is to make due process of law with its "opportunity to be heard" an empty ideality.

But we urge more than reversal of error upon this Court. From *Powell* v. *Alabama*, 287 U.S. 45, through *Reynolds* v. *Cochran*, 365 U.S. 525, to *Gideon* v. *Wainright*, 372 U.S. 335, this Court has defined fair play in State criminal proceedings to include the right in the accused to effective counsel at his trial. This petition contains the civil and reverse side of the coin condemned in *Reynolds* where a unanimous Court stated:

> "If in any case, civil or criminal, if a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." (p. 530)

If the 6th and 14th Amendment right to counsel in state criminal cases demands *effective* counsel, then, the 14th Amendment due process right to counsel in State adjudicatory actions threatening property and reputation should require no less; cf. *In Re Oliver*, 333 U.S. 257.

II. A sharply divided Court has held that it is not a denial of due process of law for a state to disbar a lawyer who refused to testify before a State court; *Cohen* v. *Hurley*, 366 U.S. 117. This case was specifically urged upon the Court below by the State as authority for disbarment in this cause (Dkt. 59; Brief, p. 64). The decision in *Cohen* is at least understandable when viewed within its facts; i.e., an attorney's refusal to cooperate in an investigation by a court of which he was an officer. But in this cause, petitioner appeared before a legislative committee in another jurisdiction and objected to the scope and pertinence of some of the questions asked him. Petitioner understands this Court's decisions regarding "failure to cooperate" require questions pertinent to the matter under inquiry; cf. *Lerner* v. *Casey*, 357 U.S. 468; *Beilan* v. *Board of Education*, 357 U.S. 399. Yet no action has even been brought against petitioner under *2 U.S.C. 192* for raising such an objection. Petitioner also understands the "failure to cooperate" cases to require advance warning to an attorney of the possible consequences of his refusal to cooperate, *In Re Anastaplo*, 366 U.S. 82. Such advance warning was manifestly impossible in this cause since petitioner's appearance before the Congressional Committee preceded the filing of the information for disbarment by approximately three years.

Questions not pertinent to the scope of the resolution creating the legislative committee should not have been asked petitioner; *Sinclair* v. *U. S.*, 279 U.S. 263; *Russell*

v. *U. S.*, 369 U.S. 749; *Deutch* v. *U. S.*, 367 U.S. 456. We believe it an absolutely lethal doctrine that a lawyer may be subsequently disbarred by a State Supreme Court for raising pertinency and scope objections to questions asked him by a Federal legislative committee. For if lawyers are unable to resist such legislative encroachments then little hope may be maintained for this Court's holdings that such encroachments may be resisted. We urge that *Cohen* be held rigidly to its facts and the law laid down therein regarding the inherent powers of a court to discipline a member of it's own bar for refusal to cooperate with it after warning said member of the consequences of such refusal. Any extension of *Cohen* such as exists in this case is unquestionably that "fundamental unfairness" which is violative of due process of law.[14]

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[14] The continued validity of *Cohen* v. *Hurley*, supra, is questionable in the light of *Malloy* v. *Hogan*, 378 U.S. 1. Since petitioner's correct objection to some of the questions asked him by the McClellan Committee is essentially bottomed upon his right to free speech guaranteed by the First Amendment, e.g. *Watkins* v. *U. S.*, 354 U.S. 178, this Court might well review its decisions involving a citizen's "failure to cooperate" as balanced against his claim of constitutional right, e.g. *Anastoplo* and *Cohen*, supra; see also McClellan Hearings 18606.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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